In The

Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING CO., and PERMIAN BASIN RADIO CORPORATION,

Appellants,

Against

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

A local police power enactment, not discriminatory as against interstate commerce, nor an undue burden thereupon, is here sought to be upheld. One may admit that appellants each are engaged in interstate commerce, yet the application of Sec. 67-7-13, N.M.S.A., 1953 Compilation to them, does not constitute a regulation of interstate commerce within the meaning of the Constitution.

Huron Portland Cement Co. v. City of Detroit, 362 U. S. 440 (1960).

Appellant Permian can claim no shield from its duty to obey the law of this state by virtue of the Federal Communications Act. True, there are statements by this Court to the effect that the act constitutes a complete scheme for the regulation of radio broadcasting. But such statements must be viewed in the light of the factual background involved. Insofar as the issuance of licenses to broadcast is concerned, and the assignment of frequencies that the broadcaster may use is concerned, there is no room for state regulation. It is in this sense that occupation of the field by Congress has occurred. Nonetheless, it is clear that there remains an area within which the state may enforce its law. **Radio Station WOW, Inc., v. Johnson**, 326 U. S. 120 (1945). And a proper balancing of the need for local regulation pertaining to so precious a thing as human eye sight, as against uniformity of regulation of those matters of national concern, calls for an affirmance.

Appellants are not deprived of their property without due process of law, nor have they been denied the equal protection of the laws. **Williamson v. Lee Optical of Oklahoma, Inc.**, 348 U. S. 483 (1955). By the same token, no deprivation of privileges and immunities is involved.

ARGUMENT

POINT I

The restraint of appellants under Sec. 67-7-13, N. M. S. A., 1953 Comp., is not an undue burden upon interstate commerce.

A case which pointedly illustrates this problem is Huron

Portland Cement Co. v. City of Detroit, 362 U. S. 440 (1960). Appellant maintained a fleet of steamships operating in interstate commerce upon the Great Lakes. On occasion, some of the vessels emitted smoke in excess of the standards permitted under the Detroit Smoke Abatement Code. Alterations in the structure of the ships would have been required in order to effect compliance. Two defenses were interposed by the shipowner to criminal proceedings brought against it: (1) Since the ships were regulated and licensed in accordance with standards imposed by Congress, Detroit couldn't impose additional or inconsistent standards, and (2) even if Congress had not pre-empted the field, still in all the ordinance materially affected interstate commerce in matters where uniformity of regulation was necessary. After reviewing the problem from an historic aspect, this Court said:

> "The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government."

and continued by saying:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of

> their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.'"

and concluded:

> "The claim that the Detroit ordinance, quite apart from the effect of federal legislation, imposes as to the appellant's ships an undue burden on interstate commerce needs no extended discussion. State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand."

Broadcasting or newspaper circulation certainly cannot be matters where there should be any greater degree of uniformity of regulation than interstate movement of ships. The Detroit ordinance did not exclude the vessels from the harbor. It simply prohibited the emission of excessive amounts of smoke while there. True, structural alterations of the ships were necessary, and to that extent, there easily could have been a variance between Detroit's requirements, and those of other ports. Hence, some disruption of uniformity was inherent. The overriding factor, however, was the need to prevent pollution of the air, a matter of local concern. So here, New Mexico does not exclude advertising by optometrists. It simply forbids reference to prices. That Texas may not forbid price advertising by optometrists presents a far less chance of disruption of national uniformity than was true in **Huron Portland.** Here, the overriding factor is the need to protect the treatment of the human eye from the adverse affects of price advertising.

Indeed, appellants are less likely to be subject to different local standards than were the shipowners in **Huron Portland**. Appellants have but to refrain from promulgating price advertising by optometrists in New Mexico. The shipowners, because their vessels docked in ports in different states, could well have been subjected to varying standards relative to smoke abatement.

In **Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm., 341 U. S. 329 (1951)**, this Court sustained the power of the state to exact a certificate of public convenience from appellant, who was engaged in transporting natural gas from Texas, Oklahoma and Kansas, before appellant could sell directly to industrial consumers at Dearborn, Michigan. This was clearly interstate commerce, yet the Court's reasoning was that the sales were essentially local in aspect and hence subject to state regulation without infringement of the commerce clause. The power to require a certificate of public convenience and necessity comes close to being the power to prohibit altogether. New Mexico does not seek any such drastic action.

Reference to certain fundamentals at this point is not amiss. Congress will not be deemed to have intended to strike down state health legislation unless its purpose to do so is very clear, or unless there is an actual conflict between the two laws. Absent a conflict, a residium of power rests in the states to govern matters of local concern which in a measure affect interstate commerce, **or even regulate it.** This is particularly so as to matters which because of their number and diversity, may never be dealt with by Congress. Reconciliation of the conflicting claims of state and national power can only be attained by appraisal of the competing demands of state and nation.

Southern Pacific Company v. State of Arizona, 325 U. S. 761 (1945), and cases cited.

Here, legislation by the state concerning public health is concerned. The regulation of the practice of optometry, as well as of medicine, dentistry, etc., are matters which may never recieve full treatment by Congress. Traditionally these are matters left to the states. There is no need for uniformity of regulation of advertising by optometrists by a single national authority. Hence, the argument that an unreasonable burden upon interstate commerce has occurred disappears.

Let one thing in this case be made crystal clear. New Mexico is not enjoining or regulating any acts by anyone outside its borders. Appellants indicate they believe otherwise, and in doing so, lay great stress upon **Baldwin v. G. A. F. Seelig, Inc.**, 294 U. S. 511 (1935), wherein New York's attempt to prohibit the introduction into it of milk purchased in Vermont was struck down as an undue burden on interstate commerce, where New York sought to impose its minimum milk price statutes even though the milk was purchased in Vermont. Thus, New York sought to project its statutory price scheme into a neighbor state. Both appellants are New Mexico residents and are amenable to its laws. It is advertising promulgated in New Mexico which is the subject of the injunction. (R. 21). Roberts is free to orginate any kind of advertising in Texas that he may choose, even though subsequently heard or read in New Mexico. If New Mexico, by any method, sought to control advertising promulgated in Texas, then **Baldwin** would be applicable, but such is not the case here.

Perhaps the most succinct explanation of **Baldwin** is to be found in this Court's opinion in **Henneford v. Silas**

Mason Co., Inc., 300 U. S. 577 (1937), wherein at 585 it was said:

> "The same statute provided that when milk from another state had been brought into New York, the dealer should be prohibited from selling it at any price unless in buying the milk from the out-of-state producer he had paid the price that would be necessary if he had bought within the state. New York was attempting to project its legislation within the borders of another state by regulating the price to be paid in that state for milk acquired there. She said in effect to farmers in Vermont: Your milk cannot be sold by dealers to whom you ship it in New York unless you sell it to them in Vermont at a price determined here."

In sum, New York sought to concern itself with prices for milk purchased in Vermont, a form of economic barrier, but New Mexico has no concern whatsoever with advertising originating in Texas.

In **Buck v. California**, 343 U. S. 99 (1952), appellants had been arrested for operating taxicabs without a permit. The operations involved transportation of passengers from the Republic of Mexico across unincorporated areas of San Diego County. A local ordinance required a permit for transportation across the county's unincorporated areas. This Court sustained the regulation, holding that taxi operations are local business, the regulation of which has been left to the states, even if appellants were engaged in foreign commerce. There is all the more reason for upholding the local regulations involved in this case, since they are designed for the protection of human eye sight.

Nor does there appear to be any greater protection accorded by this Court to interstate advertising, simply by virtue of the fact of advertising. See **Railway Express Agency, Inc. v. New York**, 336 U. S. 106 (1949), where local prohibition of a certain class of advertising on trucks was sustained even though the trucks moved in interstate commerce.

A case in point is that of **Bedno v. Fast**, 6 Wisc. 2d 471, 95 N. W. 2d 396 (1959), in which this Court denied certiorari at 360 U. S. 931.

Th statute in question prohibited price advertising by any person as to glasses, optometric services, lenses, frames etc. Plaintiffs, who were manufacturers and merchants of optical goods, sought an injunction and declaratory judgment in the Wisconsin courts against the defendant members of the Board of Examiners in Optometry. Plaintiffs challenged the constitutionality of the statute. They also argued the statute did not apply to them since they did not practice optometry and only applied to practitioners. Plaintiff's advertising contracts were made in Illinois, and the ads were placed in newspapers from the Chicago office. Ads were also placed in Wisconsin. All parties apparently conceded that the advertising was truthful.

Dealing with the question of interstate commerce, the Court at pages 400-401 said:

> "If plaintiff's business, although in interstate commerce, has incidents and requires activities within the state intimately related to local welfare, then those incidents and activities are subject to state regulation under the police power, unless congress has, by appropriate legislation, pre-empted the field with reference thereto."

> "All of the authorities relied upon by plaintiffs deal with false representations in advertising relating to optical goods. None of them involve truthful advertising of prescription eyeglasses. Since the prohibition of such truthful advertising is a proper exercise of the state's police power, as pointed out above, and the federal government has clearly limited its control to the field of false advertising, sec. 153.10 Stats. is constitutional. There is nothing in the statute which is repugnant to or incompatible with the federal act."

In **Bedno**, interstate advertising was involved. It violated the Wisconsin act prohibiting such advertising There was no federal act in conflict with the state legislation, and the latter was upheld as a proper exercise of the police power. The case is squarely in point, and demolishes the argument of appellants that the New Mexico legislation, so similar to that of Wisconsin, infringes upon interstate commerce.

Solomon v. City of Cleveland, 159 N. E. 121, (Ohio App., 1926) appeal dismissed 116 Ohio St. 739, 158 NE. 8, concerned the validity of an ordinance of the City of Cleveland, which prohibited the vending of any newspapers or other periodicals in the city which contained horse racing news. The Court stated that gambling was illegal, and that those who published such news were aiding and abetting in the crime. The Court quoted from the trial judge's opinion, p. 124, as follows:

> "It is also urged that the ordinance would prohibit the lawful sale of newspapers published in other states, and thereby interfere with interstate commerce and thus violate the provision of the federal Constitution in relation thereto.

> "To this I say it has been repeatedly held by the Supreme Court of the United States that legislation by one state, or a division thereof, to promote the moral welfare of its people, or to conserve their health, although such may in a measure interfere with interstate commerce, is not in violation of any provision of the federal Constitution."

Another case in point is **Ritholz v. Indiana State Board of Registration and Examination in Optometry**, 45 F. Supp. 423 (D. C. Ind., 1937). The Indiana Act prohibited any person from advertising discounts or from using such terms as 'moderate prices', 'low prices', 'guaranteed glasses', etc. in connection with the sale of glasses, lenses or frames. The federal court held the statute did not conflict with the interstate commerce clause. The Indiana act was strikingly similar to New Mexico's. The Court, as a part of its Conclusions of Law, stated that the statutes:

> ". . . are each constitutional and valid and that said subsections and section, are not, nor are any of them, in conflict with Clause 3 of Section 8 of Article I of the Constitution of the United States."

The three cases of **State v. Salt Lake Tribune Pub. Co.**, 68 Utah 87, 249 P. 474 (1926); **Post Printing and Publishing Co. v. Brewster**, 246 F. 321 (D. C., Kan., 1917); and **Little v. Smith**, 124 Kan. 237, 257 P. 959 (1927) are accorded considerable weight by appellants. First, as appellants correctly point out, these cases involved the **prohibition** of cigarette advertising, and not a restriction upon the **manner** of advertising. Second, the three decisions are all out of harmony with this Court's ruling in **Railway Express Agency, Inc. v. New York**, supra, in regard to interstate commerce.

Western Union Tel. Co. v. Foster, 247 U. S. 105 (1918), cited by appellants, is distinguishable. State regulation of interstate utility service to its patrons was involved. It was apparently only suggested by the state that it got its power to regulate by virtue of its power over the public streets over or through which the telegraph lines were maintained. This was rejected. There appeared to be no specific police power objective in the state action. Furthermore, the **Foster** case appears to be out of harmony with **Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm.**, supra.

No one is seeking to limit what the citizens of New Mexico may do in Texas or any other state. They may travel to Texas to purchase eyeglasses from Roberts. Appellants express great alarm that this right is being curtailed. Aside from the fact that no resident of New Mexico is before this Court complaining of interference with this right, one wonders at the consequences of appellants' argument. For instance, gambling is illegal in New Mexico, **Sec. 40-22-1, N.M.S.A., 1953 Comp.**, yet we will concede the right of all and sundry to journey to Nevada to engage in gambling. But surely it could not be successfully contended that New Mexico could not prevent agents of Las Vegas gambling houses from soliciting business in New Mexico, or could not prevent advertising in New Mexico announcing, for example, the quality or stakes of the poker games.

Be that as it may, appellants cite **Allgeyer v. Louisiana**, 165 U. S. 578 (1897) as authority for this proposition. The case is not in point. For one thing, it does not rest upon any feature of interstate commerce. An act of the legislature condemned any act done within Louisiana to effect insurance on property in Louisiana, in any marine insurance company which had not fully complied with

state law. This Court viewed the statute as one which unduly curtailed freedom of contract under the fourteenth amendment, i.e., to contract outside the state for property insurance. If New Mexico made criminal the act of a New Mexico resident in buying, or contracting to buy, optometric goods out of this state, **Allgeyer** perhaps would be persuasive. But it is poles apart from the case at bar. The same can be said of **St. Louis Compress Co. v. Arkansas**, 260 U. S. 346 (1922).

Throughout their brief (see for example p. 15) appellants approach this case as if it were one dealing only with an article of merchandise, trade, or commerce. Far more is involved, to wit, the public health, as we shall hereafter elaborate. That the New Mexico statutes are directed at something vastly more important than articles of trade as such, is made clear by **Sec. 67-7-14, N.M.S.A., 1953 Comp.**, providing:

> "Nothing in this act (67-7-1 to 67-7-14) shall be construed as applying to physicians and surgeons duly authorized to practice medicine in the state of New Mexico, nor to persons selling spectacles or eyeglasses who do not represent themselves as being qualified to detect and correct ocular anomalies, and who do not traffic upon assumed skill in adapting lenses to the eyes.

It is not just a mere mercantile business that is regulated.

The cases treating of such concepts as 'pre-emption', 'occupancy of the field', the issue of 'federal-state conflict' and 'burden upon interstate commerce' are legion to say the least. But many of them contain a most helpful guide, namely, the likelihood or not of retaliatory measures by other states. For example, in **Edwards v. Cali-**

fornia, 314 U. S. 160 (1941) this Court was concerned with the likelihood of other states enacting laws prohibiting the transportation into them of indigent persons as did the California legislation, the result of which would have been nation wide curtailment of commerce in passengers, and the erection of numerous barriers at the state level. In short, the very situation the commerce clause was designed to prevent. Here, the chances of retaliatory legislation are extremely remote. And even if Texas, or other states, enact legislation dealing with price advertising by optometrists, such could not adversely affect appellants, since they would not be amenable to the laws of any other state. What advertising they publish originates in New Mexico alone, and it is New Mexico's laws to which they are subject.

POINT II

Congress has not, by the Communications Act of 1934, 47 U.S.C.A., Secs. 151 et seq., so occupied the field as to prevent New Mexico's enjoining of Appellant Permian from disseminating price advertising by an optometrist.

What is the test for determining whether Congress has occupied the field? As late as 1960, in **Huron Portland Cement Co. v. City of Detroit** supra, this Court said:

> "In determining whether state regulation has been pre-empted by federal action, 'the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.'"

Actual conflict with the law of the state is the criterion, and neither the appellants, nor the Solicitor General, point to an actual conflict. Indeed, they concede that room is left to the states for some action against radio broadcasters operating in interstate commerce. This "sword" cuts the other way, of course, and we must concede that in matters such as license issuance, or the assignment of broadcast frequencies, there is no room for state action.

Thus, we have presented a case where Congress has, to a limited extent, occupied the field, and we must address ourselves to the effect of the partial pre-emption. In **Kelly v. State of Washington**, 302 U. S. 1 (1937), a like problem was presented. This Court, speaking through Mr. Chief Justice Hughes, said:

> "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot be reconciled or consistently stand together.'"

Nowhere do appellants, or the Solicitor General, point to a provision in the Federal Communications Act whereby Congress has legislated on the subject of radio advertising by those engaged in professions dealing with the public health. There is an utter lack of that ". . direct and positive . . ." conflict that must obtain before the field is occupied.

Appellants, and the Solicitor General, seem to argue that because Congress has acted in many aspects of interstate broadcasting, there is no place for state action which bears upon advertising or program content. We submit this philosophy was rejected by the **Kelly** case.

It is clear that Congress, in enacting the Federal Communications Act, did not see fit to embark upon a program of censorship, or even to prescribe program content, or the nature and extent of advertising. On the contrary, the fundamental purpose of Congress, insofar as radio was concerned, was the allotment and regulation of frequencies by prohibiting their use except pursuant to license. **F.C.C. v. Sanders Bros. Radio Station**, 309 U. S. 642 (1940).

The case of **Radio Station WOW, Inc., v. Johnson** 326 U. S. 120 (1945) is of extremely great significance. The United States had, as here, filed a brief in response to this Court's request. The state court had decreed the retransfer of property used as a radio station, but conceded it had no jurisdiction over the transfer of the license itself, recognizing that as to the latter, sole jurisdiction reposed in the Federal Communications Commission. The Commission had approved the transfer of the license. Thus, the license and licensed facilities had been separated. In addition, the state court had decreed that the parties should do all things necessary to secure a retransfer of the license itself. As to this feature of the case, this Court held that such provision in the decree constituted an infringement upon the licensing system established by Congress. Hence this portion of the state decree was invalidated.

Returning to the question raised by that part of the state decree ordering retransfer of the licensed facilities, this Court said:

"A proper regard for the implications of the policy that permeates the Communications Act makes disposition of licensed facilities prior to action by the Communications Commission a subsidiary issue of the license question. We have no doubt of the power of the Nebraska court to adjudicate, and conclusively, the claim of fraud in the transfer of the station by the Society to WOW and upon finding fraud to direct a reconveyance of the lease to the Society. And this, even though the property consists of licensed facilities and the Society chooses not to apply for retransfer of the radio license to it, or the Commission, upon such application, refuses the retransfer. **The result may well be the termination of a broadcasting station. The Communications Act does not explicitly deal with this problem, and we find nothing in its interstices that dislodges the power of the States to deal with fraud merely because licensed facilities are involved. The 'public interest' with which the Commission is charged is that involved in granting licenses. Safeguarding of that interest can hardly imply that the interest of States in enforcing their laws against fraud have been nullified insofar as licensed facilities may be the instruments of fraud.**" (Emphasis ours.)

We submit this language shows that Congress has not pre-empted the entire field. This Court pointed out how there is nothing in the act explicitly dealing with the problem, nor anything that prevented the states from acting to alleviate.

What are some of the implications of **Johnson** insofar as the case at bar is concerned? First, licensed facilities were the instruments of fraud, and yet a state decree was permitted to stand which ordered a retransfer thereof.

That could, as Mr. Justice Frankfurter in writing for the Court pointed out, **work a termination of the broadcasting station.** Yet the decree at bar is not so drastic. It prohibits a certain class of advertising in a certain manner and nothing more. Certainly, the continuation of appellant Permian is not threatened, as was true in **Johnson.** Also, if this Court is to permit such a severe threat to the station as was allowed in a case involving fraud, is there not all the more reason to affirm the New Mexico decree, which in no way threatens Permian's existence, when its licensed facilities are employed in disobedience of a statute designed to protect human eye sight? We submit that to ask the question is to answer it. True, this Court in effect stayed the operation of the Nebraska decree to enable the Commission to deal with new applications in connection with the station. But did that guarantee that there would be applications? Or that the Commission would approve one? Certainly not. Throughout his brief, the Solicitor General complains that the instant decree in effect would interfere with the Commission's duty to properly consider the scope and quality of service, or the composition of programs (matters which are for administrative determination in granting or rendering licenses); that it would interfere with a broadcaster's duty to meet local programming needs; that it would be potentially disruptive of uniformity; and that it would interfere with the public interest. **But all of this could have been said of the Nebraska decree in Johnson.** The loss of the station easily could have affected the scope of service; local needs might not have been met; uniformity could easily have been disrupted since not all states have the same elements of fraud; and certainly the public interest was threatened, since the result might be no one operating station WOW.

The Solicitor General would dismiss a case such as **Johnson** by saying that it involved enforcement of a tradi-

tional or common law right, which is permissible, whereas here we have a case of social or welfare legislation, the impact of which should not fall upon broadcasters or their facilities. We submit that is no distinction. It is not the cause (such as a traditional crime or tort) of the state action which is controlling, but rather is the impact upon the broadcaster, and the degree of interference therewith. As seen, the degree of interference by the state action in **Johnson** was far more severe than here.

Regents v. Carroll, 338 U. S. 586 (1950), further substantiates our position. There, as here, the Federal Communications Commission filed a brief amicus curiae. The petitioner (Board of Regents) had entered into a stock purchase contract, which according to Commission findings would have seriously jeopardized its financial ability to conduct its station in the public interest. The Commission refused renewal of the license until petitioner repudiated the contract. The Georgia courts enforced it; thus presenting this Court with the task of deciding whether a state could enforce a contract where to do so would have the practical effect of **nullifying the Commission's order.** In fact, petitioner defended the action on this, and another ground. The Supremacy Clause of the Constitution, **Art. 6, Cl. 2**, was thus involved.

This Court affirmed, resting its decision on **Radio Station WOW, Inc. v. Johnson**, supra. The Commission had based its refusal to renew petitioner's license, absent repudiation of the contract, on the basis that renewal would not be in the public interest. There was nothing in the Federal Communications Act specifically empowering it to adjudicate the contractual liability of a licensee. Petitioner argued that the Commission was faced with a dilemma — either it had to condone violation of its rules pertaining to financial responsibility and renew the license anyway;

or, deprive the listening public of the advantages of a station under petitioner's management. While sympathizing with the Commission's position, this Court affirmed and refused to interfere with the state action. Finally, it was held irrelevant that the respondents had not intervened in the license renewal proceedings.

Here then was a real threat to the broadcaster and its duty to act in the public interest. (Compare the Solicitor General's argument that the public interest which the Commission must consider should exclude the action taken by New Mexico). It could have refused to repudiate the contract, thus entailing loss of its license. Or, it could have taken the course it did and suffer the consequences of breach of contract, i.e., a judgment against it for $145,000.00.

The Solicitor General, throughout his brief, stresses the adverse impact upon the public interest if New Mexico can enjoin the price advertising. We submit the impact of the state action in this case is far less of a threat to the public interest in continued broadcasting than was inherent in the **Carroll** case. The case at bar involves no threat to appellant Permian's continued operations. Nor does it present the possibility of nullifying an order of the Commission. One minor phase of its advertising, and that alone, is involved. In addition, the Solicitor General argues that appellee could have presented its views to the Commission the last time Permian's license renewal was pending, and could have urged a refusal to renew because of violation of state law, See Brief p. 36. We submit this argument is disposed of by this Court's refusal to place any significance on the failure of respondents in **Carroll** to intervene before the Commission, when the license renewal proceedings were pending.

In **Kroeger v. Stahl**, 248 F2d. 121 (C.A. 3, 1957), the plaintiff operated a radio station licensed by the F. C. C. He desired to transfer his station to a new location and received temporary authorization from the F.C.C. to do so. The new location was in an area zoned by local ordinance, as residential only. Plaintiff sought injunctive relief against the local officials from interfering with the construction and operation of his radio facilities. He contended the ordinance conflicted with the Radio Communications Act; that it was an improper exercise of police power; that it imposed unwarranted burdens on interstate commerce; and that it was confiscatory and arbitrary. After stating that zoning ordinances are proper police power measures to protect the public health, safety and welfare, the Court at page 123 said:

"As to whether or not the ordinance is inconsistent with powers delegated by Congress to the Federal Communications Commission or is an unwarranted interference with interstate commerce, the following quotations set forth in the opinion of the District Court are appropriate:

" 'In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' Sherlock v. Alling, 1876, 93 U. S. 99, 103, 23 L. Ed. 819; and

" 'The principle is thoroughly established that the exercise by the state of its police power, which would

be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'." Kelly v. State of Washington, 1937, 302 U. S. 1, 10, 58 S. Ct. 87, 92, 32 L. Ed. 3.

"The mere fact that plaintiff is engaged in interstate commerce and proposes to use the property involved for that purpose does not affect the validity of the ordinance. The restrictions as to use are not directed toward the regulation of commerce; and the effects on commerce are no less incidental than those of restrictions as to use for stockyard purposes in residential districts. As such they are not so repugnant to the right or power to regulate interstate commerce as to constitute an unwarranted invasion. By the same reasoning the ordinance is reconcilable with the provisions of the Federal Communications Act of 1934, as amended, pertaining to the regulation of radio broadcasting. 47 U. S. C. A. Sec. 151 et seq."

We pose this question to appellants: If a zoning ordinance may constitutionally be applied so as to stop the constuction of a radio station duly licensed, why then may not a measure enacted in the protection of human eyesight be used constitutionally to prevent a radio station from disseminating advertising contrary to that measure? Unless the use of real estate is more sacred than the protection of the eye, we submit the question is unanswerable. Indeed, the impact of the local action in the **Kroeger** case, upon the federal license, was much more severe than in the case at bar. Interesting too is the fact that the case involved a zoning ordinance, which is a social or welfare measure, and not a traditional common law concept.

In the **Huron Portland** case, supra, this Court addressed itself to the problem presented by the fact that the shipowner possessed a federal license, and said:

> "The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce. Thus, a federally licensed vessel is not, as such, exempt from local pilotage laws, Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299, 13 L. Ed. 996, or local quarantine laws, Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, St. Ct. 1114, 30 L. Ed. 237, or local safety inspections, Kelly v. State of Washington, 302 U. S. 1, 58 S. Ct. 87 82, L. Ed. 3, or the local regulation of wharves and docks, Packet Co. v. Catlettsburg, 105 U. S. 559, 26 L. Ed. 1169. Indeed this Court has gone so far as to hold that a state, in the exercise of its police power, may actually seize and pronounce the forfeiture of a vessel 'licensed for the coasting trade, under the laws of the United States, while engaged in that trade.' Smith v. Maryland, 18 How. 71, 74, 15 L. Ed. 269. The present case obviously does not even approach such an extreme, for the Detroit ordinance requires no more than compliance with an orderly and reasonable scheme of community regulation. The ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage. We cannot hold that the local regulation so burdens the federal license as to be constitutionally invalid."

Appellants cite various cases in which this or other courts have said that the Federal Communications Act occupies the field or creates a comprehensive system of

regulation of radio. We cannot deny that court opinions exist which employ such language. Nonetheless, these statements must be viewed in thelight of the facts and situation present in the particular case. See for example **Scripps-Howard Radio, Inc., v. Federal Communications Commission,** 316 U. S. 4 (1942) (Brief of Appellants, p. 25) wherein a procedural question was involved, and no state statute was before this Court; **Federal Communications Commission v. Pottsville Broadcasting Co.,** 309 U. S. 134 (1940) (Brief of Appellants p. 25) wherein there was no issue of state-federal conflict; **Benanti v. U. S.,** 355 U. S. 96 (1957) (Brief of Appellants, p. 25) where the issue was whether evidence obtained by a wire tap by state officers in violation of the Federal Communications Act was admissible into evidence in a federal court; **National Broadcasting Co. v. U. S.,** 319 U. S. 190 (1943) (Brief of Appellants p. 25) where the issue was the Commissions authority to promulgate chain broadcasting regulations; and **Lamb v. Sutton,** 164 F. Supp. 928 (D. C. Tenn., 1958) (Brief of Appellants pp. 25-26) which was a libel action, and wherein the remark of the court quoted by appellants was in regard to the provisions against censorship of **47 U. S. C. A. Sec. 315.** The Solicitor General employs some of these cases for the same purpose as appellants.

Appellant Permian says it is faced with a dilemma (Brief p. 31), citing **Farmers Union v. WDAY,** 360 U. S. 525 (1959). We see no dilemma. Obedience to the state law would remove the problem, **and if obeyed, could not place Permian in any position of prejudice with the Commission, or work a violation of the Communications Act.** The broadcaster was faced with no dilemma once **Farmers Union** was decided, as this Court held that he was given a federal immunity from liability for libelous statements broadcast by a political candidate. Compare the **Carroll**

and **Johnson** cases, supra, where the broadcasters were left with serious dilemmas.

The Solicitor General cites **Allen B. Dumont Laboratories v. Carroll**, 184 F 2d. 153 (C. A. Pa., 1950). Appellants likewise cite the case, contending it is the decision most closely in point, i. e., that the state has no power to censor radio programs. Pennsylvania had enacted legislation providing for state censorship over broadcasting of motion pictures by television.

Dumont represents another decision in which it is said that Congress has occupied the field. But what were the facts and issues before the Court? First, the Pennsylvania statutes invovled were not set out in either 86 F. Supp. 813 or 184 F. 2d. 153, although the regulation provoking the litigation was. From the latter, it was clear that Pennsylvania imposed a comprehensive censorship scheme on all films for television broadcasts. The regulation was squarely directed at broadcasts and had the censorship of broadcasting as its sole purpose. That the purpose of the state regulation and the purpose of the national regulation are material is firmly established by **Huron Portland** in determining the issue of pre-emption. The New Mexico provisions against price advertising **are not directed against broadcasting as such, as was true in Dumont.** They do not constitute a wholesale scheme of censorship. Their affect on the broadcaster is only incidental. The court of appeals mentioned provisions of the Communications Act which were involved. They were:

47 U. S. C. A. Sec. 308 (b) providing for the Commission to check the character of an applicant.

47 U. S. C. A. Sec. 307 (d) dealing with license renewals.

47 U. S. C. A. Secs. 309 (b) (2) and 310 (b) prohibit

ing license transfer or assignment without Commission approval.

47 U. S. C. A. Sec. 303 (m) (D) authorizing suspension of a licenes for transmitting profane or obscene words or meaning, or false or deceptive signals, and

18 U. S. C. A. Sec. 1464 providing for criminal sanctions for uttering indecent, profane or obscene language by radio.

Then the court said:

> "It is clear from the foregoing that Congress was concerned with the contents of the programs of all broadcasting stations including television transmitting stations, and provided exemplary penalties, including loss of license and penal sanctions **for the transgressor who should broadcast an indecent or obscene program.** Congress did not intend to control in advance the broadcasting of radio programs **but it did intend to prevent the transmittal of obscene matter through the ether.** Program control was entrusted to the Federal Commission and it is an effective one." (Emphasis ours.)

Thus it is **apparent that the Dumont** case was concerned with either **indecent, profane** or obscene publications, or with **false or deceptive signals.** Both of these were covered by **the the Communications** Act. We submit **Dumont** is thus limited, **and is nowise** controlling here since no conflict **obtains.**

In the case at bar it is **truthful advertising** that is involved, and as correctly pointed out in the opinion below, the Communications Act doesn't attempt to regulate truthful advertising.

Program control as such is not given to the Commission. The Solicitor General, and appellants, as we understand their argument, assert that a species of program control has been delegated to the Commission by virtue of its authority to consider the needs of the public in issuing or renewing licenses. In the latter proceedings, program content, including advertising, must be considered, it is true. However, that is a far cry from saying that the Commission is given power, as a separate and independent item, to regulate advertising content. Indeed, 47 U. S. C. A. Sec. 326 expressly negatives any such concept. And see **Federal Communications Commission v. Sanders Bros. Radio Station**, supra, wherein at 475 it was said:

> "The Commission is given no supervisory control of the programs, of business management or of policy."

The point is that although the Commission may take certain things into consideration, it is not thereby given exclusive jurisdiction over such matters. See **U. S. v. Radio Corporation of America**, 358 U. S. 334 (1959). And so in the case at bar, while it may give consideration, in appropriate proceedings, to content of advertising, it does not follow that the Commission has jurisdiction over advertising to the extent that state action is precluded. Thus, the numerous authorities cited relative to Commission consideration of program content in applicaton or renewal proceedings are not in point. Indeed, the Solicitor General concedes (Brief p. 10) the Commission's authority is centered around its licensing functions.

Appellants would seek to magnify the impact of New Mexico's action by asking this Court to assume (Br. pp. 30-31) that New Mexico prohibited all advertising by optometrists. This is not warranted by the law, as it is only price advertising with which this case is concerned.

The Solicitor General cites cases (Brief p. 5) to the effect that federal pre-emption of the field will occur by assumption or inference when the federal interest is dominant, or from the broad scope of authority conferred on the federal agency. This may have been the law at one time. But we submit it no longer is in view of **Huron Portland** holding that **actual conflict** between federal and state law is the criterion. Indeed, this Court in **Huron** compared its holding with that in **Napier v. Atlantic Coast Line R. Co.**, 272 U. S. 605, one of the cases relied upon by the Solicitor General, and in which this Court found pre-emption even though the state act was different in purpose. By contrast, the purpose of the federal and state acts was most material in **Huron.**

Then the Solicitor General (Brief p. 17) acknowledges that a broadcaster's duty to meet local needs may include the obligation to refrain from accepting advertising in violation of law. Of course, the broadcaster should do so, and the Commission ought to give weight to this in application or renewal proceedings. But that is only one factor for the Commission to consider. It may or may not be controlling; and the Commission is not amenable to state law. In the meantime, who is to make the station law abiding? Only the state authorities, unless, of course, this Court is prepared to say the Federal Communications Act creates such a shield that a licensed broadcaster may flout state law at will. We submit neither the act or the commerce clause were so designed.

The Solicitor General insists (Brief p. 24, for example), that uniform national regulation of content of programs is as necessary as regulation of transmission. Yet he also takes the position that each broadcaster must give heed to local needs and be largely governed thereby, and must obey state law. We venture the remark that this appears

inconsistent. In effect, this is saying that the states can't touch program content, because it is national in scope and any laws touching it are unconstitutional; but nontheless the broadcasters must obey those state laws because otherwise the disobedience may give rise to Commission refusal to renew a license.

Then, the Solicitor General expresses concern over the situation of advertising through network broadcasts. First, network advertising isn't involved in the instant case. Second, we submit the law of the state where the station is located, absent a conflict with federal statutes (which is not shown to exist) should govern, when, as here, it is enacted as a local health measure applicable to all. It is one thing to say that the state regulation here conflicts with federal authority (Brief p. 29), and quite another thing to show that " . . . direct and positive conflict . . ." which is made the criterion of pre-emption. **Kelly v. State of Washington**, supra. Appellants and the Solicitor General fail in this regard.

Appellants and the Solicitor General, constantly stress the fact that the optometrist whose advertising is involved is a Texas resident. We fail to see the significance in this, for if he were a New Mexico resident, New Mexico's injunction against Permian would have no greater, nor less, impact on interstate commerce.

It is conceded by the Solicitor General (Brief p. 29) that the Communications Act doesn't broadly withdraw from the states the power to redress private wrongs. He says the fact that the Act contains no remedial provisions on behalf private persons is strong evidence no pre emption was intended by Congress in the field of private actions. Appellee agrees wholeheartedly. **But exactly the same is true of redress of public wrongs violating state**

health measures. There, too, the Act contains no relevant provisions. There, too, it must be said that Congress intended no pre-emption. It will not do to say that redress of private wrongs by state courts presents little chance of conflict with federal policy. Consider, for example, the state judgment for $145,000.00 against the broadcasters in **Regents v. Carroll**, supra, which this Court allowed to stand. When viewed with the grim spectre of an execution for $145,000.00, to be levied on property used in broad casting, we would say that some threat to continued broadcasting of anything was quite likely. Yet the state action was permissible — not because "private" wrongs were involved, but because this Court ruled against pre-emption.

Appellee submits that it is relevant to consider, in this matter of pre-emption, what Congress could have done, but didn't. It might have provided, with appropriate guides or standards, that the Commission should regulate with regard to the type of advertising to be allowed. Or Congress might have forbidden all interstate advertising relative to alleviation of human ills. Or Congress might have forbidden interstate advertising by those engaged in treating eyesight, or teeth, or any other bodily defect. Or Congress might have forbidden interstate advertising by lawyers. But it didn't! And so, the only inference is that Congress intended no pre emption, leaving these matters to the states, absent something such as false signals or obscene utterances. Clearly, this field has not been pre empted.

POINT III

The injunction does not constitute state action prohibited by the Fourteenth Amendment.

One would think this whole problem had been set at rest by **Williamson v. Lee Optical of Oklahoma, Inc.**, 348

U. S. 483 (1955), wherein there was no dissenting opinion, although Mr. Justice Harlan took no part in the consideration or decision in the case. This Court, speaking through Mr. Justice Douglas, pp. 489-490, said:

> "Third, the District Court held unconstitutional, as violative of the Due Process Clause of the Fourteenth Amendment, that portion of Sec. 3 which makes it unlawful 'to solicit the sale of . . . frames, mountings . . . or any other optical appliances.' The Court conceded that state regulation of advertising relating to eye examinations was a matter 'rationally related to the public health and welfare', 120 F. Supp. at 140, and therefore subject to regulation within the principles of Semler v. Oregon State Board of Dental Examiners, supra. But regulation of the advertising of eyeglass frames was said to intrude 'into a mercantile field only casually related to the visual care of the public' and restrict 'an activity which in no way can detrimentally affect the people.' 120 F. Supp. at 140-141.
>
> "An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to regulate one effectively it would have to regulate the other. Or it might conclude that both the sellers of frames and the sellers of lenses were in a business where advertising should be limited or even abolished in the public interest. Semler v. Oregon State Board of Dental Examiners, supra. The advertiser of frames may be using his ads to bring in customers who will buy lenses. If the advertising of lenses is to be

> abolished or controlled, the advertising of frames must come under the same restraints; or so the legislature might think. We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."

While the narrow issue was a deprivation of due process of law, what the Court said in the last sentence above quoted is clearly dispositive of appellants' contentions relative to freedom of speech and of depriving appellant Head of privileges and immunities. And this Court's reasoning is the complete answer to the belaboring by appellants of whether or not advertising of glasses is commercial or not (Brief pp. 36-38).

Thus the power of the state to forbid price advertising by optometrists has been conclusively established. If legislation of this sort works no constitutional violation as to the optometrist, then ipso facto it is valid as to those with whom the optometrist would advertise.

At this juncture, appellee must object strenuously to the injection by appellants of a new issue into this case, i. e., freedom of speech and press. Rule 40 (d) (2) of this Court forbids the raising of an additional issue not raised in the jurisdictional statement. The Jurisdictional Statement, under "Questions Presented" at p. 3, is as follows:

> "(1) unconstitutional as an undue and unreasonable burden on interstate commerce under the Commerce Clause of the United States Constitution, Article I, Section 8, clause 3.
>
> (2) unconstitutional under Section 1 of the Four-

teenth Amendment to the United States Constitution, either as an abridgment of their privileges and immunities as citizens of the United States, or as a deprivation of their property without due process of law, or as a denial to them of equal protection of the laws."

It contains no reference to a challenge under freedom of publication. Rule 15, subdivision 1 (c) (1) of this Court provides that only those issues raised in the jurisdictional statement will be considered. Appellants' Notice of Appeal (R. 54) gave notice that the following issues were to be presented (R. 56):

> "(1) unconstitutional as an undue and unreasonable burden on interstate commerce under the Commerce Clause of the United States Constitution, Article I, Section 8, clause 3.
>
> (2) unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution, either as an abridgment of their privileges (sic) and immunities as citizens of the United States, or as a deprivation of their property without due process of law, or as a denial to them of equal protection of the laws."

Rule 10, subdivision 2 of this Court limits consideration to those questions set forth in the notice of appeal. Nor was this an issue raised in the state courts. (R. 4-5, 8, and 14).

Appellants (Brief p. 34, footnote 18) anticipate our objection, but they say that freedom of press is as truly a right of property as it is of liberty. But appellants are in a trap in saying this. If freedom of the press and right of property (due process) are one and the same questions

then the **Williamson** case, supra, dispells the argument of appellants about freedom of expression. On the other hand, if these are different questions, appellants have seriously violated the rules of this Court. At any rate, publishers by newspaper or radio are not singled out, the law merely applies to them what it applies to others, and consequently, there is no unconstitutional restraint on expression. **Lorain Journal v. U. S.**, 342 U. S. 143 (1951).

Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608 (1935), while not relating to optometry, involved an Oregon statute forbidding certain advertising by dentists, including price advertising. The plaintiff asserted the act violated the due process and equal protection clauses of the **Fourteenth Amendment**, and impaired the obligation of contracts contrary to **Sec. 10, Cl. 1, Art. 1** of the Constitution. This Court held the statute to be a valid exercise of the police power, to which the plaintiff's contracts were subject, and further, that there was no unconstitutional discrimination, or arbitrary interference with either **liberty or property**. This Court, pp. 612-613 said:

> "And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards.
>
> "It is no answer to say, as regards appellant's claim of right to advertise his professional superiority or his performance of professional services in a superior manner, that he is telling the truth. In

framing its policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners."

That this reasoning is equally applicable to advertising related to optometry is established by this Court's use of **Semler** in the **Williamson case.**

> As was said in **Bedno v. Fast**, supra:
> "To permit price advertising on the part of those who deal with the human eye, even truthful advertising, is to leave the door open for the unscrupulous practitioner to lure and to defraud unsuspecting members of the public."

In **Ritholz v. Commonwealth**, 184 Va. 339, 35 SE 2d, 210 (1945), suit was instituted by Virginia State Board of Examiners in Optometry, charging respondents with the illegal practice of optometry, particularly in regard to the resort to illegal advertising in newspapers. The Court held that the advertising of the sale of glasses and optometrical services at prices is apt to be used as bait to the unwary, and that the reasonable statutory regulation of advertising involving professional services is proper where evil will occur in the absence of such legislation. The Court held that the legislation was proper under the police power, and that due process was not infringed upon.

See also, **City of Springfield v. Hurst**, 144 Ohio St. 49, 56 N. E. 2d 185 (1944), **Ritholz v. Johnson**, 246 Wi. 442, 17 NW 2d 590 (1945); **Abelsons v. New Jersey State Board of Optometrists**, 5 N. J. 412, 75 A. 2d 867 (1950); **Seifert v. Buhl Optical Co.**, 276 Mich 692, 268 N. W. 784 (1936); **Bennett v. Indiana State Board of Reg. and Ex. in Optometry**, 211 Ind. 678, 7 N. E. 2d 977 (1937); **Klein v. Department of Reg. and Ed.**, 412 Ill. 75,

105 N. E. 2d 758 (1952); and **State v. Rones**, 223 La. 839, 67 So. 2d 99 (1953), holding that statutes like those at bar constitute no violation of due process or of equal protection.

New Mexico's statute is clearly a legitimate police power measure. Its operation, of course, is limited to advertising promulgated in New Mexico. It could not and cannot operate upon advertising promulgated elsewhere. The suggestion by appellants (Brief p. 39, footnote 21) that because New Mexico hasn't proceeded against news media in other states, they are thereby subjected to discrimination, needs no discussion.

POINT IV

The injunction, as to Appellant Head, does not deprive her of her privileges and immunities as a citizen of the United States.

In **Madden v. Commonwealth**, 309 U. S. 83 (1940) the issue was whether a state statute, which imposed on its citizens an annual tax on their bank deposits in banks out of the state at a higher rate than on their bank deposits in the state, was an infringement upon privileges and immunities. This Court said:

> "The appellant presses urgently upon us the argument that the privileges and immunities clause of the Fourteenth Amendment of the Constitution of the United States forbids the enforcement by the Commonwealth of Kentucky of this enactment which imposes upon the testator taxes five times as great on money deposited in banks outside the State as it does on money of others deposited in banks within the State. The privilege or immunity which appellant contends is abridged is the **right to carry on business**

beyond the lines of the State of his residence, a right claimed as appertaining to national citizenship.

"There is no occasion to attempt again an exposition of the views of this Court as to the proper limitations of the privileges and immunities clause. There is a very recent discussion in Hague v. Committee Industrial Organization. The appellant purports to accept as sound the position stated as the view of all the justices concurring in the Hague decision. This position is that the privileges and immunities clause protects all citizens against abridgment by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship. This Court declared in the Slaughter-House Cases that the Fourteenth Amendment as well as the Thirteenth and Fifteenth were adopted to protect the negroes in their freedom. This almost contemporaneous interpretation extended the benefits of the privileges and immunities clause to other rights which are inherent in national citizenship but denied it to those which spring from state citizenship. In applying this constitutional principle this Court has determined that the right to operate an independent slaughter-house, to sell wine on terms of equality with grape growers **and to operate businesses free of state regulation** were not privileges and immunities protected by the privileges and immunities clause. The Court has consistently refused to list completely the rights which are covered by the clause, though it has pointed out the type of rights protected. We think it quite clear that the right to carry out an incident to a trade, business or calling such as the deposit of money in banks is not a privilege of national citizenship." (Emphasis ours).

It is apparent that appellant Head has suffered no deprivation of privileges and immunities, and **Madden** is conclusive on this point. She cites three cases under this point. **Crutcher v. Kentucky**, 141 U. S. 47 (1891) involved a license which was required before any business could be done, which was viewed as a condition precedent to engaging in interstate commerce. **Lovell v. City of Griffin**, 303 U. S. 444 (1938), involved an ordinance prohibiting distribution of circulars, handbooks, advertising or literature of any kind, and wasn't decided on the basis of privileges and immunities. **Edwards v. California**, supra, was decided under the commerce clause, although four members of this Court expressed the opinion that the California act, forbidding entrance into that state of certain persons, ran afoul of the privileges and immunities clause.

In any event the short answer is that no citizen of the United States is before the Court complaining that his or her right to move freely from state to state has been curtailed. And even if so, as Mr. Justice Jackson pointed out in **Edwards**, the right of free movement is not an unlimited one, but is subject to some control by state government.

CONCLUSION

For the foregoing reasons, judgment should be affirmed.

Respectfully submitted,

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